No. 14978

United States
COURT OF APPEALS
for the Ninth Circuit

THE GRAY LINE COMPANY, a corporation,
Appellant,

vs.

R. C. GRANQUIST, District Director of Internal Revenue,
Appellee.

APPELLANT'S PETITION FOR REHEARING

Appeal from the United States District Court for the District of Oregon

JACOB, JONES & BROWN,
RANDALL S. JONES,
MORRIS J. GALEN,
522 Public Service Building,
Portland 4, Oregon,
Attorneys for Appellant.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 11-56

SUBJECT INDEX

CASE INDEX

STATUTES

OTHER AUTHORITIES

No. 14978

United States
COURT OF APPEALS
for the Ninth Circuit

THE GRAY LINE COMPANY, a corporation,
Appellant,

vs.

R. C. GRANQUIST, District Director of Internal Revenue,
Appellee.

APPELLANT'S PETITION FOR REHEARING

Appeal from the United States District Court for the District of Oregon

To the United States Court of Appeals for the Ninth Circuit and the Honorable William Healy, Walter L. Pope, and Dal M. Lemmon, Judges thereof:

Comes now the appellant in the above entitled cause and hereby respectfully petitions this Honorable Court for a rehearing of the above entitled cause, and respectfully shows:

The appeal in this cause was argued in Portland, Oregon, on September 5, 1956 before the Honorable Judges above named.

October 12, 1956, this Court rendered its decision in favor of the appellee on the question of whether appellant was operating its vehicles "on an established line" within the meaning of section 3469 (a), IRC 1939, and on the question of whether appellant collected transportation taxes from passengers going to and from the Portland airport in appellant's vehicles, and in favor of the appellant on the question of whether it was liable to a penalty under section 1718 (c), IRC 1939.

The grounds upon which the appellant relies are as follows:

I

This Court in a material way misapprehended the evidence. The evidence clearly shows that the appellant's operation was not on an "established line" within the meaning of Section 3469 (a) of the Internal Revenue Code of 1939, and that this Court was in error in holding otherwise.

II

This Court overlooked Revenue Ruling 54-47 which shows that appellant's airport limousine service was not operated "on an established line."

III

This Court erred in treating Regulations 42, Section 130.58 as though it governed the issue of whether appellant's operation was on an established line, or as though it had the force of law.

IV

Even within the meaning of Regulations 42, Section 130.58, appellant was not operating said limousine service on an established line, and this Court erred in concluding otherwise.

V

This Court erred in upholding the lower court's finding and conclusion that the fares paid to appellant by the limousine passengers included transportation tax; and erred in holding that such fares included such tax.

STATEMENT OF FACTS AND POINTS OF LAW UPON THE ABOVE GROUNDS I, II, III and IV

Appellant respectfully submits that the Court was mistaken in holding that appellant's limousine service was operated on an established line. The evidence clearly shows appellant was not operating its vehicles "on an established line" within the meaning of Section 3469 (a) of the Internal Revenue Act of 1939.

In deciding that the appellant's operation was on an established line, this Honorable Court did not mention Revenue Ruling 54-47 discussed on pages 47-48 of Appellant's Brief and pages 16-17 of Appellant's Reply Brief. (Revenue Ruling 54-47 was incorrectly cited at p. 47 of the Appellant's Brief. The correct citation is Internal Revenue Bulletin, Cumulative Bulletin, 1954-1, p. 269.)

This ruling is a clear determination by the Commissioner that where limousines are operated to and from an airport and surrounding areas and passengers are picked up and delivered at any place or places designated by them, "as distinguished from pick up and discharge points established by the limousine company," such vehicles are not considered operated on an established line, and if they have a seating capacity of less than ten adult passengers, including the driver, the tax is not applicable to amounts paid for such transportation. This ruling determined that an operation essentially the same as that involved in the case at bar did not come within the statute. The significant thing about this ruling is not who established the pick up or discharge points, but that they were not established by the limousine company. The relevant language of the statute has never been changed. The ruling tells the meaning of the statute as it is now and as it always has been. The ruling does not speak prospectively only, any more than does a court decision.

The appellant did not establish any pick up points. It did not designate the places to which the passengers were delivered. The facts on this point are clear and uncontradicted and brings this case directly within the scope of the revenue ruling.

Treasury Regulations 42, Section 130.58 is discussed in the opinion (Op. 5). This section of the Regulations deals only with generalities. When an actual case similar to that with which we are concerned was presented to the Commissioner, he departed from generalities and

dealt with the matter specifically in Revenue Ruling 54-47. This ruling being definitive of the statute and specific in application, controls.

This Court recognized the fact that the appellant did not designate the places of pick up. In the Opinion, the Court stated:

> "He [the driver] would then pick up passengers at the places so designated [to the driver upon telephone call to the airline company] and drive them to the airports." (Op. 2.)

It is respectfully submitted that the Court should have considered Ruling 54-47, and should have given decisive weight to the fact that appellant did not designate pick up or discharge points.

Even if Treasury Regulations 42, Section 130.58, rather than Revenue Ruling 54-47 were a proper criterion in the case at bar, appellant's operation was not "on an established line."

This Court's opinion speaks of "the garage and the three hotels" as being "definite points." Ruling 54-47 cannot be disregarded in ascertaining the meaning of "definite points." By this ruling the Commissioner has said in substance that the term "definite points" as used in the Regulations with respect of operations similar to appellant's means points "established by the limousine company" (App. Br. 47). The hotels were not designated by appellant, but by the airlines and the passengers (Finding 10; Tr. 45, 75, 86, 88, 90). This Court recognized this fact in its opinion (Op. 2). The record

shows that the limousines went only to those hotels or places which the passengers had designated as the places where they would board the limousine, and no where else (Finding 13; Tr. 46, 71, 75). The garage was no exception. It was only the home base. No passenger line operated to or from the garage. The fact that "in some instances" passengers desired to and did board a limousine at the garage, does not make it a "definite point" within the meaning of Treasury Regulations 42, Section 130.58 as appellant did not designate pick up points (Finding 10; Tr. 45, 83).

V

Appellant did not collect any tax from any passenger transported to or from the airports. Because of *Royce vs. Squire,* 168 F. 2d 250, appellant knew that it could never have a judicial determination of whether its airport limousine service was operated on an established line if it collected taxes from passengers. Appellant steadfastly maintained it was not operating on an established line and steadfastly desired such judicial determination. Consequently appellant carefully avoided collecting such tax.

The holding of the lower court that the money paid to appellant by limousine passengers included the transportation tax is contrary to the undisputed facts of this case and is based solely on an inference which appellant respectfully submits is untenable.

The inference is supported by nothing except the use of a bus, an inapt remark by counsel, and a raise in the price of the fare 13 months and 21 days after the Deputy Commissioner wrote a letter to the appellant.

During the course of the trial, appellant's attorney pointed out that on one early morning emergency a bus was used. This was a single exception to the otherwise total use of seven passenger limousines. The Commissioner of Internal Revenue had assessed against the appellant transportation tax on account of all the trips (Finding 4; Tr. 43). In pointing out this one exception in the kind of vehicles used appellant's attorney said: " . . . I think we owe the tax on the $24 worth of fares, or about $4.00 on this that we have not got any right to get back under any circumstances because there is one bus among all these limousine waybills" (Tr. 81).

This one exception was seized upon by the lower court as indicating that appellant collected transportation taxes from all the passengers (Tr. 34). The opinion of this Court of Appeals states: ". . . appellant concedes that $4 of transportation taxes were properly assessed, . . ." (Op. 7), and that the lower court observed ". . . the charges for rides on the bus was concededly not exempt from the transportation tax . . ." (Op. 7). No where has there been any concession that a tax was collected from any passenger on that bus or from any other passenger. Attorneys do not always speak with technical accuracy in the heat of a trial. All appellant's attorney meant was that appellant should have collected a tax of about $4.00 (actually $2.70) on account of the passengers (18 rather than 24) carried in the bus as it had a seating capacity of more than ten passengers. His inaccuracy in technical expression, however, should afford no basis for holding a tax was collected when the evidence clearly shows otherwise.

By a letter dated July 30, 1948, a Deputy Commissioner of Internal Revenue informed the appellant that it was the opinion of the Bureau that the limousines operated by appellant were operated on an established line within the meaning of the statute and regulations. August 21, 1949 (13 months and 21 days after the date of the letter) the fare was increased from 85¢ to $1.00. Based on this letter, this raise in fare, the use of a bus on 1 emergency trip out of 800 trips coupled with counsel's inapt statement, the lower court erroneously inferred that appellant collected a transportation tax on this bus trip and on all of the 799 limousine trips. The appellant respectfully submits that the facts undisputably show that what the lower court inferred is not so, and that the basis of this inference requires careful reexamination by this Appellate Court.

If standing alone the facts mentioned in the foregoing paragraph might possibly give rise to the inference last mentioned, the inference is nevertheless clearly overcome by the uncontradicted evidence in this case. Resting as it is on no substantial base, the inference must give way to the actual facts.

The finding by the trial court that the appellant collected the transportation tax from its airline passengers and employees is in the nature of an ultimate finding of fact and as such is a conclusion from other facts and is subject to review free from the restraining impact of the so-called "clearly erroneous" rule applicable to ordinary findings of fact made by trial courts. *Philber Equipment Corp. vs. Commissioner,* USCA, 3rd C, 9/27/56, No. 11860, CCH Par. 9934.

No correlation can be drawn from the raise in fare and the Deputy Commissioner's letter. They are two entirely unrelated incidents separated by almost 14 months in time. Appellant never acquiesced in the interpretation set forth by the Deputy Commissioner in his letter; and in the opinion this Court recognized that appellant acted reasonably in contesting such interpretation (Op. 8). Furthermore, if any relationship had existed, it must follow that the tax would apply equally to fare charged airline employee passengers as well as to fares charged regular passengers, yet there was no increase in the amount charged employee passengers. It is not reasonable to assume that with respect to one class of passengers appellant collected a tax and that with respect to another class appellant did not collect the tax.

The facts disclose that the full amount of the fare collected by appellant was recorded on its books as revenue and included in its income for all purposes including the purpose of income tax. Income taxes were paid upon the full fares collected. No amount was set aside, deducted, or recorded as a transportation tax. No part of the fares collected from airline passengers for limousine service were reported in appellant's transportation tax returns. (Appellant had a transportation tax account and collected and paid transportation taxes on another type of transportation furnished by it.)

The year here involved for income taxes is barred by the statute of limitations, yet according to the opinion, portions of the fares reported in appellant's income for income tax purposes are now determined to be actually

transportation taxes collected by appellant. Appellant's conduct shows that it did not intend to and did not collect such tax.

This Court's statement with respect of the penalty finding of the trial court applies with equal vigor to the issue of whether appellant collected the tax. Appellant's attorneys advised it that its transportation service was not subject to the tax and that it did not have to collect the tax. Appellant heeded this advise and did not collect any tax. The negotiations and litigation over the years referred to by this Court in its opinion concerned the question of whether or not appellant should collect the tax. They did not involve the question of whether or not appellant should pay a tax if a tax were collected. That issue had been decided in the *Royce v. Squire,* supra, and both appellant and its counsel knew this.

The *Royce* case was decided upon facts not present in this case. This was clearly illustrated at pages 50 and 51 of Appellant's Brief and pages 15 through 23 of Appellant's Reply Brief. A review of the decision in the *Royce* case shows the basic and material distinctions between the two cases. The *Royce* case was decided by this Court solely on the basis of the facts therein set forth, and furnishes no precedent in the case at bar.

In the *Royce* case each increase charged by the limousine company followed immediately upon a tax rate increase and was in almost the exact amount of the tax increase. Prior to October 10, 1941, the limousine company in the *Royce* case collected a fare of 75¢. That day the tax at 5% was imposed, and the same day the

charge to the passenger was raised to 80¢. November 1, 1942 the tax rate was raised to 10% or an increase of 5%, and on the same day the charge was raised exactly 5% to 84¢. April 1, 1944 the tax was increased another 5% to 15%, and on the same day the charge was increased from 85¢ to 90¢. During this period said limousine company billed the airlines for a fare of 75¢ for employees plus the appropriate tax (73 F. Supp. at 513). There was nothing like this in the case at bar. The raise in fare in the instant case on August 21, 1949 was simply to take care of increased costs of operations and had no relation to the tax.

In the *Royce* case the limousine driver specifically informed the passengers that a part of their fare was federal transportation tax. That was not so in appellant's operation. Neither the appellant nor its agents ever said the charge included a tax. In the *Royce* case the limousine company segregated the fares and taxes on its books as separate items. That was not so in appellant's operation. In the *Royce* case, the plaintiffs reported in their transportation tax returns the monthly total of taxes collected for their limousine service as shown by its books. That was not so in appellant's case. In the *Royce* case, the plaintiffs did not treat the full amount collected from the passengers as revenue. They reported in their income tax returns as revenue or income only that portion of the fares not set aside as a tax. That was not so in appellant's case where appellant reported as income and paid income taxes based upon the full amount of charge to each passenger. The charge was all fare.

We respectfully submit that the facts in this case give rise to only one inference and that is that appellant did not collect any tax from its airport passengers.

MISCELLANEOUS POINTS

1. The opinion (p. 6) states that Congressional approval of the former regulation gives such regulation the force of law. The "former regulation" appears to be the regulation made under the Revenue Act of 1917. If that is the regulation referred to, we have been unable to find Congressional approval of that regulation, and even if the Congress had approved it, we respectfully submit that such approval would have no bearing upon the case at bar.

2. It is also respectfully submitted that this Appellate Court misapprehended the doctrine of "administrative construction." As shown by *Wilmette Park Dist. v. Campbell,* 338 U.S. 411, and *Crane v. Commissioner,* 331 U.S. 1, cited in the opinion, the doctrine of administrative construction is based upon the repeated reenactment of relevant statutory language without change after the issuance of a regulation interpretive of that language. There never has been a reenactment of that provision of Section 3469 (a) of the Revenue Code of 1939 that employs the term "operated on an established line." The changes in Section 3469 (a) referred to by the court all relate to rates except as follows: The 1949 change added a sentence concerning a port in Newfoundland without reenacting any prior provision. The 1950 change ex-

panded the coverage of the section so as to include certain travel outside the United States without reenacting any prior provision. The 1951 change struck out the 1949 addition and inserted in its place provisions about stops at various ports followed by a substantial reenactment of what had been added in 1949, but again without reenacting any other provision of the section. In view of these facts it is respectfully submitted that it is erroneous to regard Regulations 42, Section 130.58 as either being a controlling force or as having Congressional approval so as to give it the force of law.

3. At page 6 of the opinion it is said: "Congressional action was taken with knowledge of the definition given by the Regulations." As authority for this, the cases of *Mass. Mutual Life Ins. Co. v. U. S.,* 288 U.S. 269, *Helvering v. Reynolds Co.,* 306 U.S. 110, and *Crane v. Commissioner,* supra, are cited. It is respectfully submitted that these cases do not support the statement. Whatever may have been the knowledge of the Congress about the regulations mentioned in those decisions, it does not follow that the Congress knew of or considered Regulations 42, Section 130.58 when it made the changes referred to in the immediately preceding paragraph.

4. The opinion (p. 6) states that "Section 3471 (a) of the Revenue Code of 1939 provides that a claim for refund of transportation taxes must be based on an erroneous collection, . . ." A reading of the entire section shows that the "collection" referred to is a collection of the transportation tax from passengers by the person claiming the refund, and not the collection from

such person by the Director of Internal Revenue. It is respectfully submitted that this section has no application to the case at bar as the appellant did not collect any transportation tax from any passenger. Sections 3770 (a) (1) and 3772 (a) (1) IRC 1939, apply in this case. These sections authorize a refund of taxes erroneously assessed or collected from a taxpayer by the Director of Internal Revenue. Please see Appellant's Reply Brief pages 18 and 19.

CONCLUSION

It is also respectfully submitted that upon rehearing counsel will be able to assist this Court better to examine and understand the record of this case, and that a rehearing should result in a revision of this Honorable Court's decision and a reversal of those parts of the decision holding:

(a) that appellant's vehicles were being "operated on an established line," and

(b) that appellant collected transportation taxes from airport passengers.

And, it is further respectfully submitted that a miscarriage of justice will occur if this case is not reversed on said points.

WHEREFORE, the appellant respectfully prays that this petition for a rehearing be granted; and that this Honorable Court exercise its power to determine and that it determine that appellant did not operate its limousines "on an established line" within the meaning of

Section 3469 (a) IRC 1939, and that no portion of the fare charged by appellant to its limousine passengers or the money collected by appellant from its limousine passengers constituted transportation tax; and

Appellant also prays that this case be reheard en banc; and that the decision of the District Court be reversed in its entirety.

Respectfully submitted,

JACOB, JONES & BROWN,
RANDALL S. JONES,
MORRIS J. GALEN,
522 Public Service Building,
Portland 4, Oregon,
Attorneys for Appellant-Petitioner.

I hereby certify that in my judgment, as counsel herein, the foregoing petition is well founded in law and it is not interposed for the purposes of delay.

RANDALL S. JONES,
Of Counsel for Appellant-Petitioner.